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IN THE

Supreme Court of the United States

OCTOBER TERM, 1960

No. 282

ALLEN V. TORNEK, An Individual Trading As ALLEN TORNEK COMPANY, *Petitioner*

v.

FEDERAL TRADE COMMISSION, *Respondent*

PETITION FOR REHEARING

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PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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PETITION FOR REHEARING

The Petitioner, Allen V. Tornek, by and through counsel, respectfully petitions the Court for rehearing of order denying petition for a writ of certiorari entered on the 10th day of October 1960, and as reasons therefor submits the following:

OTHER SUBSTANTIAL GROUNDS AVAILABLE TO PETITIONER ALTHOUGH NOT PREVIOUSLY PRESENTED

The following reasons previously overlooked or not clearly stated in the first Petition, as to why writ should be granted in this matter are set out below:

The Opinion and Final Decree of the Court of Appeals reflects erroneous statement of fact crucial to

legal application both in the instant case and broadly as Stare Decisis.

The first Petition filed in this matter attempted to set out the fact that the Court of Appeals decision was hinged on a mistake of fact. On reflection, counsel for petitioner now earnestly urges that this crucial point did not appear clearly and did not recite proper case authority so as to give this Court a coherent picture of the issues involved.

As previously pointed out, the Court of Appeals stated in its Per Curiam opinion, referring to 21 jewel watches in the trade that "*there are no jewels that do not have either a function of bearing, or a function of protection against wear from friction*".

This statement of the facts by the Court of Appeals in its Opinion is *consistent with the evidence as urged by petitioner here*, and with the findings and conclusions entered by the hearing examiner below; *but it is inconsistent with the findings and conclusions entered by the Commission*, which reversed the hearing examiner, who had found that petitioner's jewels served the function of protecting against wear from friction.

That is, it has consistently been the position of the petitioner that since the hearing examiner and the Commission both found that petitioner's special jewels increase the longevity of moving parts of the watch, then, these jewels are performing "*a function of protection against wear from friction*", even though not serving "*a function of bearing*". The erroneous statement of fact appearing in the Opinion of the Court of Appeals throws the legal principles into a state of chaos. For, if the Court of Appeals means what it says

in the Opinion, then it cannot affirm the order of the Federal Trade Commission, as even the Commission has conceded that longevity of parts is extended by petitioner's resevoil device. If the Court of Appeals does not mean what it says in the opinion, then the whole watch industry will suffer under the misapprehension that a device that prolongs longevity against wear may be called a jewel, even though not serving a function as a bearing, for this is the statement of the Court of Appeals.

This Court has faced the dilemma of conflicting opinions before, and the Court's attention is most respectfully drawn to the following cases: *CIR* v. *Church's Estate*, 335 U.S. 632; *Helvering* v. *Hallock*, 309 U.S. 106; *Helvering* v. *St. Louis Transit Company*, 296 U.S. 39.

While these cases involved interpretation of the Internal Revenue Code, the principle is the same as that in the instant case. Two controlling authorities cannot stand antipodal without the creation of chaos and confusion. It is most respectfully submitted that the decision of the Court of Appeals will in its present state create confusion because of facts previously stated.

It is well established that a decision based on a judicially noticeable error is not to be followed as Stare Decisis. *Moore* v. *U.S.*, 157 F. 2d 760 (1946). Yet, unless this Court acts to clarify either an injustice, or a mistake of fact, such a decision will in fact be controlling for an undeterminable period, and will undoubtedly create the same type of confusion as was manifested in those cases already cited.

CONCLUSION

The definition of a watch jewel given by the Court of Appeals in its opinion, consistent with petitioner's arguments throughout these hearings, is a misstatement of fact if it purports to adopt findings and conclusions of the Federal Trade Commission, which rejected this definition in reversing its duly designated hearing examiner.

That definition will make enforcement of the cease and desist, at best, difficult and will serve to confuse the watch industry generally since it provides a definition which that industry has never been willing to accept.

WHEREFORE, the premises considered, in light of the substantial grounds here presented but, although available to petitioner, not previously presented, petitioner prays that this Petition For Rehearing be granted.

CERTIFICATE OF FILING IN GOOD FAITH

I, B. Paul Noble, being counsel for Petitioner, Allen V. Tornek, certify that this petition for rehearing is filed in good faith and not for purposes of delay, and that the Petition is based upon substantial grounds available to the petitioner although not previously presented as prescribed in Rule 58 (2) of the Revised Rules of the Supreme Court of the United States.

Very respectfully submitted,

B. PAUL NOBLE

CERTIFICATE OF SERVICE

Certified that a copy of the foregoing PETITION FOR REHEARING was mailed this 3rd day of November, 1960, postage prepaid to Frederick H. Mayer, Esq., Federal Trade Commission, Washington, D. C., Alan B. Hobbes, Esq., Federal Trade Commission, Washington, D. C., Office of the Solicitor General, Justice Department, Washington, D. C.

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